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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

METROPOLITAN TRANSPORTATION AUTHORITY and METRO-NORTH COMMUTER RAILROAD COMPANY,

Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, *Respondents,* and NATIONAL RAILROAD PASSENGER CORP., *Intervenor.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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Petitioners argued in the Court of Appeals that the use of avoidable costing as a methodology for computing the compensation due them in a taking setting violates those constitutional principles of equity and fairness that have traditionally governed proceedings in eminent domain because its inevitable assignment of dominant user status to Petitioners denies them any significant contribution toward the costs they incur in operating the Hudson Line. See "The Essential Unfairness of Avoidable Costing," Petition, at 16-23.[1] Respondents claim that the Court of Appeals'

[1]The principal issue in this case is the constitutionality of applying avoidable costing principles in a taking setting. Respondents' claim that no taking has occurred is untenable. The just compensation clause

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rejection of this argument is not in conflict with the decisions of other circuits which have considered the issue. They are wrong; the Third Circuit, whose views were urged upon the Court of Appeals by Petitioners, disagrees. The case was *Southeastern Pennsylvania Transp. Auth. v. ICC*, 644 F.2d 238 (3rd Cir. 1981), herein referred to as *SEPTA*, the holding of which was distinguished below as being "based on [the Third Circuit's] view of the legislative intent behind the [Rail Act] and the [Final System Plan developed under that Act], not on its view of constitutional dictates." Petitioners' Appendix, at 21a. That distinction loses its force, however, once it is appreciated that the question before the Third Circuit was in large part the very same question which is

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cannot be repealed by characterizing the nature of a governmentally-compelled occupancy of private property as the impressing of a trackage right, rather than an easement, over land. Whichever device is employed, it relieves the beneficiary of the status of a trespasser for the agreed-upon term (here indefinitely). Moreover, although we dispute its relevancy, the fact is that Amtrak has been given substantial occupancy, not just a right-of-passage, in this case. It shares the use of a great railroad terminal, selling its tickets and reservations, embarking and disembarking its passengers and occupying prime terminal berths with its trains for hours and days at a time. The Government's incredible claim that the occupancy is transitory flies in the face of reality. It has gone on for almost sixteen years and Amtrak would be the first to admit that it will almost certainly continue for many years to come. No precedent in this Court holds that the regulated railroad industry has so far lost the protection of the Fifth Amendment as to permit Congress to requisition the property and personnel of individual railroads for its favored beneficiary in the guise of trackage rights regulation. None of the cases cited by Respondents so holds; indeed, none of them involves factual circumstances which give even the appearance of a taking. (The closest case, *Pennsylvania Co. v. United States*, 236 U.S. 351 (1915), was resolved not by compelling a railroad to receive the trains of another but by telling it that it could not discriminate in the acceptance of trains from other railroads.) The ruling below that a taking has not occurred in the circumstances of this case is truly unprecedented. Respondents are correct when they argue that *Loretto v. Teleprompter*, 458 U.S. 419 (1982), and *FCC v. Florida Power Corp.*, No. 85-1658 (Argued December 3, 1986), are not in point. Those cases involve mere technical trespasses compared to the full-scale requisitioning of plant and personnel present

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posed by this case: whether it was equitable and fair for the Commission to employ an avoidable-costing methodology to compel the owner of a jointly-used line of railroad to absorb the common costs arising out of its operation.

In *SEPTA* the precise issue was whether the governing statutes enacted by Congress authorized the Commission to employ an avoidable-costing methodology, with its built-in requirement for the identification of a dominant user, in determining the subsidy payable to Conrail for operating a local authority's commuter trains. The line over which the trains operated, originally owned by Conrail, was also used by Conrail's freight trains. When the authority purchased the line from Conrail in 1979, the Commission was asked whether that transfer, under which Conrail reserved trackage rights to continue its freight operations, affected the statutory subsidy payable to Conrail for operating the commuter service. The Commission's response was that the subsidy had to be increased. It held that the governing statutes contemplated the use of an avoidable costing methodology in determining the subsidy payable where the use of a line is shared, and that for the purposes of that methodology the authority was not only a joint user of the line, through Conrail's operation of the authority's commuter trains, but its dominant user as well, because under the Commission's regulations the mere fact of ownership raised a conclusive presumption of dominance. The consequence of that decision, of course, was to saddle the authority's commuter service with the line's common costs for so long as the authority chose to have Conrail operate that service.[2]

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in this case. If the FCC had ordered Florida Power to make available to the cable television company twenty percent of the transmission capacity of Florida's own power lines, that case would be closer to this.

[2]That consequence was not as drastic as in the instant case because the Commission first divided common costs into two categories, variable (costs the amounts of which are determined by the extent of usage, as in the case of the replacement of worn track) and fixed (costs the amount of which are determined without regard to the extent of usage, as in the case of damage from a storm), and it then ignored its own avoidability rules and proceeded to apportion the variable common costs between the two services, freight and commuter, on the basis of various usage for-

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SEPTA involved no constitutional issue. Congress, Conrail's owner, could validly condition the furnishing of Conrail's services in the operation of the authority's commuter trains in any way that Congress saw fit. The sole question was whether its particular statutory delegations to the Commission of the power to prescribe the subsidy payable for Conrail's services permitted the Commission to engage in avoidable costing where Conrail's freight service shared the use of a line, and, if they did so permit, whether they sanctioned the assignment of the all-important status of dominant user on the basis of ownership alone. But those statutory delegations, in the circumstances of that case, turned out to require the calculation of a subsidy based upon the very same standards which the Constitution makes applicable in calculating the compensation due upon a taking in eminent domain, the standards of fairness and equity. Thus, the Third Circuit held that while the delegating statutes used language which could validly "support contradictory inferences" regarding the costing principles to be employed in calculating the subsidy, they nevertheless reflected "one paramount legislative concern," and "that was that costs should be allocated according to principles of fairness and equity." *Id.*, at 251-252. The court then proceeded to hold that the assignment of dominant status under an avoidable-

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mulas (*id.*, at 251) which were acceptable to both the commuter authority and Conrail. It was the burden of fixed common costs, as to which no allocation was permitted, against which the commuter authority rebelled. In the instant case the Commission has compelled Petitioners to absorb all common costs, fixed and variable, save for an insignificant portion of the latter category which is shared under the SFGT formula. Petition, at 20, n.23. When Respondents make the claim that Amtrak will be contributing over $800,000 a year to help defray Petitioners' costs under the Commission's decision, this Court should understand that only $182,000, a truly insignificant amount considering the amounts Petitioners must spend to run their railroad (see Petition, at 19), would be applied against Petitioners' common costs under the SFGT formula. All the rest would be in reimbursement of costs incurred at Amtrak's special request and for its sole benefit. See Petitioners' Appendix, at 43a. Those costs are not in issue before this Court. This case concerns *common* costs. In the railroad industry, if *those* costs are not shared, the owner of the line has effectively been denied compensation.

costing methodology to one user based on ownership alone, thereby saddling him with all fixed common costs, was inconsistent with principles of fairness and equity for two reasons: "[I]t may not reflect the relative use on the line by the type of service being provided, and its imposition of all of the fixed costs on the owner, irrespective of the amount of usage by another service, does not accord with notions of equitable sharing." *Id.*, at 252.

The Third Circuit left the door open for the Commission, at rehearing, to arrive at the same conclusion, that one user should absorb all fixed common costs, if it concluded upon the evidence before it that that was "the only feasible method of allocating such costs," *id.*, but the court's opinion made it clear that such a conclusion would have rough sledding if the matter came before the court again. In this regard it stated:

> We find little merit in the [Commission's][3] final justification of administrative necessity for imposition of the presumption that ownership and dominant usage are correlative. The [Commission's] entire cost methodology presupposes the feasibility of ascertaining the extent of usage. All of the common variable costs are assigned in this manner, although the measuring device for usage varies with the particular cost. There is no reason why an allocation-methodology cannot be devised with respect to fixed costs.

Id., at 251.

Moreover, the Third Circuit recognized common costs as being what they truly are, not the "overhead costs of 'ownership'" which the Second Circuit believed them to be in the instant case (Petitioners' Appendix, at 21a), but "costs which are, by definition, essential to the operation of either service without regard to whether there is another service using the same line." *Id.*, at 250.[4]

[3]The rules at issue in *SEPTA* were actually promulgated by the Rail Services Planning Office, but the Third Circuit held that that office was "sufficiently part of the [Commission]" to permit Hobbs Act review. See 49 U.S.C. §10361: "The Rail Services Planning Office is an office in the Interstate Commerce Commission."

[4]This was said, of course, of fixed common costs, because the variable common costs, having been allocated between the commuter authority

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If the instant case does indeed involve a taking, as Petitioners have claimed, and if the statutory "principles of fairness and equity" which the Third Circuit enforced in *SEPTA* are nothing less than the "ideas of fairness and equity" which are implicit in the command of the Fifth Amendment that "just compensation" be paid upon a taking, see *United States v. Commodities Trading Corp.*, 339 U.S. 121, 124 (1950), then Petitioners submit that *SEPTA* provides strong support for their position in this litigation.

It is just as unfair and inequitable for the Commission to deny Petitioners an Amtrak contribution toward their common costs in the instant case as it was for it to employ mere ownership as a basis for denying the local commuter authority a Conrail contribution toward that authority's common costs in *SEPTA*, and for the very same reasons. First, the Commission's decision, in practice, fails to "reflect the relative use on the line by the type of service being provided" by Amtrak, *SEPTA, 644* F.2d, at 252, because it gives a free ride to someone whose relative usage of 70 miles of a 75-mile long line of railroad is substantial by any standard—anywhere from 15.9% to 23.7%, depending on the allocation factor employed.[5] And the "type of service" being given that free ride is not a slow-moving freight service which receives little benefit from Petitioners' sophisticated signal and switching systems and its expensive maintenance programs; it is a high-speed passenger service which takes full advantage of those systems and programs. Second, considering those special benefits, and considering the substantial usage levels enjoyed by Amtrak, the imposition on Petitioners of all but an insignificant fraction of common costs in the circumstances of this case does no more "accord with notions of equitable sharing" *id.*, at 252, than did the Com-

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and Conrail on a basis agreeable to both, were not in issue. It cannot be doubted, however, that the court would have said precisely the same thing of variable common costs had they, too, been in dispute.

[5]See discussion of relative usage in Petition, at 20, 21 and n. 24.

mission's ownership-based denial of a Conrail contribution toward fixed common costs in *SEPTA*.

Petitioners submit that the decision of the Third Circuit in *SEPTA* is an indictment of the free-ride concept inherent in avoidable costing. Petitioners submit, further, that the Commission shares the Third Circuit's views and that it applied avoidable-costing rules in this case not because it believes that those rules are fair and equitable but because it was told to do so by Congress. When it has had a free hand in the selection of a costing methodology, and when it is adjudicating in the context of an acknowledged taking, the Commission has employed fully-allocated costing, just as Petitioners urged it to do in the instant case. Thus, in a case arising under the terminal-sharing provisions of Sec. 3(5) of the Interstate Commerce Act, now codified at 49 U.S.C. §11103(a), where the Commission was specifically instructed by Congress to determine the compensation payable to a terminal owner using principles employed in condemnation proceedings, this same Commission declared that the sharing of *all* common costs *including* depreciation, on a "user basis" was "fair". See *MKT Railroad Co. v. Kansas City Terminal Railway Company*, 198 I.C.C. 4 (1933), at 12.[6] And when the Commission handed down its first relevant decision under the statute governing this case, Sec. 402(a) of the RPSA, *before* that statute's "just

[6]The terminal-sharing statute is the only federal law known to Petitioners with a reach comparable to Sec. 402(a) of RPSA. Under that statute, too, it is possible for the Commission to compel a railroad to accept the entry of another railroad's trains onto its property indefinitely. The constitutionality of the statute has never been contested in a federal court, a circumstance which may well be attributable to the fact that the Commission has employed fully-allocated costing principles in its application. *MKT* is regarded as the Commission's controlling precedent in the application of the statute. The Court of Appeals held in this case that *MKT* did not involve the question of "how much compensation is constitutionally required." Petitioners' Appendix, at 22a. And yet the terminal-sharing statute there at issue then commanded, and still does, that constitutional concepts be invoked, that is that compensation be established "under the principle controlling compensation in condemnation proceedings" (see current version at 49 U.S.C. §11103(a), penultimate

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and reasonable" compensation command was converted to an avoidable-costing command,[7] this same Commission held that where a minority user's operations were at all substantial, it should share in all common costs on a usage basis in accordance with the rules of fully-allocated costing. *Trustees of Property of Penn Central—Compensation for Passenger Service*, 342 I.C.C. 820 (1973). Indeed, it was this latter decision which prompted Congress to amend Sec. 402(a) to require avoidable costing and to issue a conference committee report instructing the Commission that in no event was Amtrak to be required to contribute to a contracting railroad's common costs.[8]

In reciting this sequence of events, Petitioners should not be understood as being critical of Congress' decision to mandate avoidable costing. If Sec. 402(a) is construed as applying to just those private railroads which joined the Amtrak club in 1971 and succeeded in shedding their deficit-ridden long-haul passenger operations at the price of a dues payment equal to just a fraction of one year's deficit, then the Congressional decision to deny a contribution toward common costs is understandable. Avoidable costing in that context would not be unjust. The participating

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sentence). Moreover, *MKT* made it clear time and again that that was precisely what the Commission was attempting to do, to apply condemnation principles (*id.* at 4, 5, 13 and 14). And a subsequent decision of the Commission, *Chicago-Milwaukee Trackage Rights*, 342 I.C.C. 578 (1973), characterized *MKT* as having determined "condemnation criteria" to be applied in joint terminal occupancies.

[7]The Government contends that when M.T.A. contracted to rescue Penn Central in 1972, Section 402(a) was already "on the books" and M.T.A. had fair warning that avoidable costing was all it could expect if compensation ever became an issue. That claim is patently erroneous. When M.T.A. committed itself to Penn Central Section 402(a) mirrored the Fifth Amendment by requiring the payment of just and reasonable compensation, nothing less. The avoidable-costing mandate which provoked this litigation was subsitituted in 1973, more than a year later.

[8]See Amtrak Improvement Act of 1973, Pub. L. No. 93-146, §10(1). And see Conference Rep. No. 93-587, 93rd Cong., 1st Sess. (1973), at 6. To quote the conference report, "The term 'incremental' [*i.e.* avoidable] does not include any portion of common costs."

railroads would be receiving compensation from Amtrak roughly equivalent to the amounts they would have saved "had they simply discontinued [long-haul] passenger service." See the dissent of Commissioner O'Neal in *Trustees of Property of Penn Central—Compensation for Passenger Service, supra,* 342 I.C.C., at 836. Unfortunately the Court of Appeals rejected Petitioners' argument that Sec. 402(a) was intended to be so limited and that it should not be construed as applying to entities like Petitioners who were never engaged in the long-haul passenger business.[9]

[9]Absent a Sec. 402(a) remedy, Amtrak would still have the right to requisition the use of Petitioners' facilities. Petitioners firmly believe that Congress made specific provision for the use of the Hudson line by both Amtrak and Conrail when it enacted the Northeast Rail Service Act of 1981. Petitioners believe that that provision, Sec. 504(f) of the RPSA, as added by Sec. 11347 of NRSA, accomplished a statutory condemnation of trackage rights over the line for their special benefit. If Petitioners are correct in that belief, that provision specifically requires both Amtrak and Conrail to pay MTA "just and reasonable compensation", *not* limited to avoidable costs, *not* reduced by penalties for poor performance, *not* subject to the bait of bonuses and *not* as determined by the Commission rather than by an Art. III Court, for their use of the line. Moreover, Petitioners believe that Judge Friendly ultimately came to share their belief. See Petitioners' Brief in the Court of Appeals, at 18-22. The Court of Appeals disagreed, giving Sec. 504(f) an interpretation, in the process, which defies common sense. Petitioners nevertheless do not complain of that error for the reason that even if Section 504(f) had been held to be controlling, the Court of Appeals would surely have held that the use of avoidable costing satisfies its "just and reasonable" compensation standard. It is that precise issue which is fundamental to this litigation because a statutory "just and reasonable" standard and the constitutional standard of "fairness and equity" which the Petitioners believe this case invokes are one and the same. *New Haven Inclusion Cases*, 399 U.S. 392 (1970). Petitioners have raised that issue in their Petition. They earnestly seek to have it determined by this Court.

CONCLUSION

For these reasons, and for the reasons stated in the Petition, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals.

Respectfully submitted,

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